

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 62 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

BHARAT TOYABHAI JADAV

Versus

STATE OF GUJARAT

Appearance:

MR MEHUL SHARAD SHAH for Petitioner
Mr K G Sheth, APP for Respondent No. 1
MR HS MUNSHAW for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 25/04/2001

ORAL JUDGEMENT

Rule. By consent of the parties, this Revision Application is being heard and disposed of finally today.

The present application in Revision has been preferred by the petitioner above named who is facing criminal trial before the learned Addl. Sessions Judge, at Gandhinagar in Sessions Case no.47/2000. In the aforesaid matter, the alleged victim Alkabab was examined before the said court at Exh.8 on 2.1.2000. Learned Advocate for the present petitioner, who is accused in the said matter had cross-examined the said witness at length. Thereafter on 9.1.2001, an application was submitted at Exh.15 before the trial court for recalling the said witness for further cross-examination. It was mainly on the ground that there was some sort of reconciliation between the petitioner and the witness Alkabab and the petitioner wanted to bring certain additional facts on the record of the case of the Court. Therefore, it was prayed that the witness may be recalled and further cross-examination may be permitted. The learned trial Judge heard the parties and dismissed the said application of the petitioner on 16.1.2001 observing that sufficient opportunity was given to the petitioner to cross-examine Alkabab and the present application was made by the petitioner to prolong the trial. On these two considerations, the application was dismissed by the learned trial Judge on 16.1.2001.

2. Feeling aggrieved by the said order of the trial court, the petitioner-original accused has preferred this application in Revision. It has been mainly contended here that the trial court has not properly appreciated the legal and factual aspects of the case and the order of the trial court is illegal, perverse and deserves to be set aside. The petitioner, therefore, prays that the application be allowed, the aforesaid order of the trial court be set aside and the aforesaid witness may be permitted to be recalled for further cross-examination by the petitioner.

3. It would be very clear that section 311 of the Criminal Procedure Code, 1973 (for short 'the Code') provides that "Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case." Therefore, it is clear that the Code provides for the recall of witness already examined.

4. The question is as to whether the recall of

witness was absolutely necessary having regard to the facts and circumstances of the case in question. It has to be reported here that the learned Sessions Judge, who dismissed the application for the recall of the witness has considered only two grounds, firstly; he has said that sufficient opportunity was granted to the petitioner to cross-examine witness Alkaben. On going through the application of the petitioner before the trial court, it is nowhere stated that the petitioner did not get adequate opportunity to cross-examine the witnesses. Therefore, this ground was not even pleaded by the petitioner either in the application or during the course of his argument before the trial court. That ground has again not been advanced before this court. The second objection which the trial court has taken is that the application was given by the petitioner for recalling of the witness with a view to prolong the trial. Now, if the petitioner wanted to induct a small new fact the trial could not have been prolonged. The trial court should have imposed certain conditions for the recall of the witness. Even adjournment could have been restricted to a particular, short period. Even further cross-examination after recall of the witness was under the control of the learned Sessions Judge. If despite the aforesaid position, if the learned Judge felt that it was not a genuine application of the petitioner for the recall of the witness and it was merely to prolong the trial of the case, then in that case, further appropriate order could have been passed by the trial court. At the same time, when it has been brought to the notice of the trial court that a new fact was noticed, it was a matter of subsequent development and when the said aspect was supported by a letter dated 30.1.2001, said to have been addressed by the witness Alkaben to the petitioner and the xerox copy of the said letter was produced on record then in that event, I am of the view that it was in the fitness of things to permit the present petitioner to recall the aforesaid witness for further cross-examination.

5. In support of the argument before this court, the learned Advocate for the petitioner has relied upon a decision of the Supreme Court in Mohanlal Shamji Soni v. Union of India, reported in AIR 1991 SC 1346. There the Supreme Court was required to consider section 540 of the Criminal Procedure 1898 and the provisions made in Section 311 of the Code of Criminal Procedure, 1973. The Supreme Court has observed that the second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be

obtained is essential to the just decision of the case.

6. In the present case also, it was placed before the trial court that there was subsequent development which was required to be placed on the record of the case. I am of the view that such a development which took place after the commencement of the trial was really an essential part of the factual aspect for the just decision in the matter, and therefore, I am of the opinion that the petitioner should have been permitted to recall witnesses for further cross-examination. In above view of the matter, I am of the view that though the trial may be prolonged to some extent, probably by now the trial could have been concluded before the trial court, had there been no passage of about three months during the period during which the matter has been kept pending for hearing. Any way, I am of the opinion that the trial court has committed error in law in not permitting additional opportunity to the petitioner to recall the witness and to further cross-examine the witness on the subsequent development which is found to be a fact essential for the just decision in the matter.

In that view of the matter, for the larger interest of justice, the present Revision Application is allowed. The order of the trial court is set aside and the petitioner is permitted to recall the witness and to further cross-examine her. It would be open to the prosecution to put further question to the witness, if at all the prosecution desires to do so. In other words, the prosecution would not be debarred from taking further examination-in-chief and re-examination, if any, as and when the witness may be recalled by the trial court. Direct Service is permitted. Rule made absolute accordingly.

25.4.2001 [D P Buch, J.]

msp